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June 11, 2020

VIA E-MAIL

Mayor Murphy & Councilmembers
City of Merced
678 West 18th Street
Merced, CA 95340
cityclerk@cityofmerced.org

Re: Denial of Appeal of Conditional Use Permit (CUP) #1238 and Site Plan Review #455

Dear President Murphy and Councilmembers:

We write on behalf of our client, Merced Holdings LP ("Applicant"), with regards to the appeal of Conditional Use Permit (CUP) #1238 and Site Plan Review #455 and the associated CEQA clearances to allow construction of a Mixed-Use Development consisting of 214 Apartments, approximately 22,000 square feet of Retail Commercial Space, and approximately 14,000 square feet of Office Space located within four buildings ranging from approximately 26 feet to 33 feet 11 inches (the "Project") on a 5.94-Acre parcel generally located at the southeast corner of Yosemite Avenue and McKee Road (the "Property").

We respectfully request that you deny the appeal and approve the Project. Failure to do so will be a blatant violation of the State's Housing Accountability Act and will subject the City to significant legal liability and financial liability of upwards of $10 million. The State is facing a severe housing crisis and denial of the Project or reduction of the density of the Project would be an abuse of the law. Applicant will take all necessary measures, including litigation, to protect its rights. We hope the City Council will carefully consider this matter and do the right thing to protect the community.

Moreover, given the ongoing health pandemic and the risks associated with travelling, Applicant will be participating in the June 15, 2020 hearing by telephone. Applicant also requests the opportunity to address the City Council at the June 15, 2020 meeting. We will coordinate with City staff to ensure that Applicant's due process rights are fully protected.

I. The June 1, 2020 Hearing Was Illegal Under The Brown Act, As Was The Closure Of The Public Hearing.

As discussed in our June 1, 2020 letter, the City failed to provide proper notice of the June 1, 2020 hearing. At its May 4, 2020 hearing, the City Council continued the Project to a future date. However, the motion adopted by the City Council provided no specific time and place for the next meeting, in direct violation of the Brown Act and City regulations of continued hearings (see Govt. Code § 54955, § 54655.1; Merced Municipal Code [MMC] § 20.70.40.C). The City Municipal Code, which is consistent with the Brown Act, allows for continued hearings without further notice, only when, "the chair of the hearing body announces the date, time, and place to which the hearing will be continued before the adjournment or recess of the hearing." The City Council clearly violated these state and City requirements by providing only vague direction as to when the next hearing would be held:

Mayor:
Ok—is there a motion to continue? Would someone like to put forward that?

Echevarria:
Yes mayor—I will; motion to continue.

Mayor:
Motion by Echevarria.
Is there a second to that motion?

Serratto:
Second.

Mayor:
Is that Serratto?

Serratto:
Yes.

Mayor:
Ok. and just asking, I think we are talking about 2 weeks, but I would just say if it needs to be 4 and staff feels like it would make a meaningful difference, then perhaps,

Carrigan:
Could we just leave it open ended? Cause I think it's going to be between 2 and 4. I promise you that.

Mayor:
Ok.
So, within 2 to 4 weeks, we'll bring it back.

This ambiguous direction does not constitute sufficient notice to the Applicant or the public as to when the next hearing on the Project would occur, thus violating the City Municipal Code and the Brown Act. Because the City did not comply with

applicable state and local regulations on continued hearings, new notice of the continued hearing should have been provided according to the City's Municipal Code for project hearings under MMC § 20.70.20.B.

Applicant did not receive new written notice of the hearing in accordance with MMC § 20.70.20.B, which requires written notice to the property owner and applicant no less than 10 days prior to the hearing. This City requirement is consistent with the state Planning and Zoning Law, which also requires no less than a 10-day notice to property owners and applicants for project hearings (see Government [Gov't] Code § 65091). The only notice Applicant received, in addition to the vague direction identified above, was a phone call from City staff late in the week prior to the June 1st hearing. Had the City provided proper notice of a continued hearing directly after the May 4th hearing, Applicant would have had approximately one month to prepare for the June 1st hearing. Had the City acknowledged the error and provided new notice, Applicant would have had at least 10 days to prepare for the June 1st meeting. Instead, Applicant had less than 72 hours to prepare for the June 1st hearing. Given the practical complications of doing business and attending public meetings during a global pandemic, this 72-hour notice certainly does not meet the minimum notice requirements for project applicants in violation of both the City Municipal Code and state Planning and Zoning Law.

Further, the City's failure to provide proper notice deprived Applicant of its constitutional due process rights. The federal and state constitutions require that, "notice must, at a minimum, be reasonable calculated to afford affected persons the realistic opportunity to protect their interests. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 617.) The California Supreme Court noted that while notice requirements, "may well suffice to encourage the generalized public participation …they [still may be] inadequate to meet due process standards where fundamental interests are substantially affected." (*Id.* at 617-18.) In the Horn case, much like our case, the aggrieved property owner received last-minute notice and was able to attend the hearing. However, the Court importantly noted that the fact that plaintiff received actual notice of the hearing and was able to attend the hearing did not waive his right to assert constitutional defects because the notice received led to no "meaningful vindication" of his due process rights. (*Id.* at 620.)

The notice provided by the City to Applicant was not reasonably calculated to afford Applicant the realistic opportunity to protect its interests. While it is true that, like in the Horn case, Applicant received actual notice of the June 1st hearing, this notice was not sufficient to allow Applicant to meaningfully defend its due process rights. Applicant was not able to meaningfully prepare for the June 1, 2020 hearing, and due to the lack of proper notice Applicant was not able to attend the hearing in person. As discussed in our June 1, 2020 letter, Applicant was not able to physically attend the public hearing due to short notice and the ongoing pandemic.

While the City called Applicant's representative to participate in some of the meeting, the City did not equitably allocate time to Applicant's representative or give Applicant equal access to address the City Council, as compared to the appellant's representative, Mr. Harriman. For example, on multiple occasions, the appellant's representative approached the dais and spoke, even though the public hearing was already closed. Instead of advising Mr. Harriman to sit down because the public hearing was closed, Council President Murphy engaged in conversation with Mr. Harriman, and the Council President entertained and ultimately granted Mr. Harriman's request to prohibit the submission of any other evidence. Applicant was given no opportunity to participate or comment on this proposal; in stark contrast to the opportunities given to the appellant's representative. The noticing requirements described above (i.e., for new and continued hearings) is the minimum required to protect due process rights. The City's blatant violation of these requirements is evidenced in and of itself of a violation of Applicant's procedural due process rights. Applicant's inability to attend and properly prepare for the June 1 hearing is additional evidence that that the notice was insufficient to afford Applicant a meaningful opportunity to protect its interests. Given that Applicant is especially aggrieved by the City's decisions, there is no question that the City's actions to close the June 1 hearing without input from Applicant is a violation of Applicant's substantive and procedural due process rights, in addition to a violation of the Brown Act and state Planning and Zoning Law, and of the City's own regulations.

The City should have continued the hearing so Applicant would have an opportunity to meaningfully participate in the process. Instead, the City Council totally ignored Applicant's reasonable request and further prejudiced Applicant by closing the record. The City Council gave no justifiable reason to deny Applicant's request for a continuance. In stark contrast, the City Council granted another applicant' request for a continuance – a request made at the dais on the evening of June 1, 2020. The City Council's failure to grant an identical request from Applicant demonstrates the City Council's bias again the Applicant and the Project.

II. Denial Of The Project or Reduction Of Project Density Will Violate The Housing Accountability Act

The Housing Accountability Act (HAA) applies to both low-income and market rate housing projects, despite the erroneous advice given to the City Council by the City Attorney at its June 1, 2020 meeting. (See Govt. Code § 65589.5(j)(1); *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1069).) The HAA specifically prohibits the City from reducing the density of the Project or from denying the Project unless it makes written findings – based on a preponderance of the evidence – that the housing project would have a "specific, adverse impact upon the public health or safety" of the community unless the Project is disapproved and that there is "no feasible method to satisfactorily mitigate or avoid the adverse impact identified."

(See Govt. Code § 65589.5(j)(1); *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993 (23 Cal.App.4th 704, 715.) "'[A] specific, adverse impact' means a significant, quantifiable, direct and unavoidable impact, based on objective, identified written public or safety standards…" No facts in the record exist that could support these findings, quite the opposite.

The Planning Commission already made findings in approving the Project that it is consistent with applicable plans and policies, that it will be compatible with existing and future land uses, that it will not be detrimental to the public health, safety, and welfare of the City, and that it can be adequately served by existing or planned services and infrastructure. It is also consistent with the City's objective standards, and nothing in the City's materials suggest otherwise. We note that there is a typo – the height of the three-story buildings is 33 feet and 11 inches. This was brought up by the Applicant at the Planning Commission, but not corrected. The staff report for the June 1, 2020 hearing repeats the findings made by the Planning Commission and recommends approval of the Project based on such compliance. There is no rationale – certainly none based on identified written public health and safety standards – to deny the Project.

Indeed, if the City did think that the Project was inconsistent with applicable plans, policies and ordinance, then the City was obligated to inform the Applicant in writing of such alleged deficiencies within 60 days of the date that the application was deemed complete. (Govt. Code § 65589.5(j)(2)(A)(ii).) The City never informed the Applicant of any inconsistencies. Therefore, as specified by Government Code Section 65589.5(j)(2)(B), the Project "shall be deemed consistent, compliant and in conformity with the applicable plan, program, policy, ordinance, standard, requirement or other similar provision" and there is no grounds to deny the Project based on non-compliance.

The record is replete with statements by the City Council about reduction of density and/or modifications to the Project, even though it meets the City's objective standards. Here are just a few of those statements:

- "My personal view is that the density is too much." (Mayor Murphy, May 4, 2020)

- "Talking about the density—we need to bring that down to 24 [du/acre]…" (Councilmember Echevarria, May 4, 2020)

The appellant also expressed support for the proposal from Mike Belluomini, which would reduce the Project density to 144 units. Any reduction of density is a blatant violation of the HAA which will subject the City to significant legal and financial liability.

III. Denial Of The Project Will Subject The City To A Penalty Of Up To $10,700,000.

Because housing is a matter of statewide importance and because the State is facing a severe housing crisis, the Housing Accountability Act sets a minimum penalty of $10,000 per dwelling unit for local agencies violating its provisions. (Govt. Code § 65589.5(k).) That fine is multiplied fivefold if the court finds that the City acted in bad faith. This means that the minimum fine for denying the Project is $2,140,000; given the City's bad faith behavior discussed herein, a court could increase that penalty to $10,700,000. This amount is four percent of the City's proposed 20-21 budget; it is more than the City is budgeting to pay the Fire Department personnel; it is approximately $4,000,000 more than the City's budget for development services; and it is more than three times the amount of the budget for all of recreation and parks. It's hard to believe that the City would subject itself to such a huge fine, especially when the City is facing a $5.4 million loss of revenue for the 2020-2021 budget projections.

IV. The Results Of The Public Records Act Request Must Be Included In the Administrative Record.

The integrity and transparency of the process is of the upmost importance to us. As you know, the entitlement process here is a quasi-judicial hearing process and the City Council must be neutral. (*Woody's Group, Inv. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1021.) We have submitted a Public Records Act request to the City. We request that all records provided to us as part of that request be included in the City's Administrative Record for this matter. We also strongly suggest that this matter be continued until all of those documents are produced.

V. Appellant's Contentions Are Without Merit.

Appellant Casey Steed, along with Merced Smart Growth Advocates (MSGA), a California unincorporated association, and the San Joaquin Valley Environmental Defense Center, a California non-profit corporation, raise multiple issues in their appeal that lack merit. Appellants seek one thing: reduction of density. As that is patently illegal under the Housing Accountability Act, we hope the City Council sees through the patently illegal request. We will briefly respond to appellants' points here.

1. The City Council denied Applicant's prior project without prejudice at the October 7, 2019 hearing, thereby allowing Applicant to reapply within one year. Moreover, the prior project was not substantially the

same as the current Project. Table 1 summarizes the significant differences.

2. There is no defect in the Planning Commission hearings for the CUP on the Site Plan Review, regardless of whether or not the Planning Commission heard the two entitlement together. Even if there was a deficiency at the Planning Commission, which is not the case, the hearings at the City Council have cured any issue.

3. The Planning Commission, not the appellants, are in the best position to interpret the meaning of the General Plan and the Zoning Code with regards to density permitted in the CN land use designation and CN zone. The findings contain substantial evidence that mixed-use developments are encouraged in the City, including in the CN land use designation, at a density consistent with the High-Density designation.

Table 1

	The Hub 2.0 Current Project	"The Hub" Prior Project
Number of Units	214 Dwelling Units	428 Efficiency units
Provided Parking Spaces	386 spaces	376 spaces
Setback of Building 1 & 3 from McKee Rd and Whitewater Way	85' / 82'4"	64'3" / 63' 2"
Building 1 & 3 height	2 Story/ 3 Story	3 Story
Outdoor Promenade	29,500 sf	11,300 sf
Average Daily Trips (Before Reductions)	1,876 ADT	2,214 ADT
Office space	14,445 sf	0 sf
Commercial/Retail space	22,672 sf	17,999 sf

4. The CEQA findings are supported by substantial evidence. The traffic study makes reasonable assumptions about the residents of the Project. Specifically, the traffic study uses trip generation rates for off-campus student housing for the single occupancy units and for multi-family housing for the two-and three-bedroom units. Given the proximity of the Project to nearby colleges and the demand for student housing, the assumption for the one-bedroom units is reasonable and supportable. Appellant's concerns about traffic patterns is unsubstantiated by any evidence. CEQA does not require the alleged "safety analysis" of the parking lot requested by appellants.

5. Neither the CEQA Thresholds in Appendix G nor the City's own regulations requires an internal circulation plan. Indeed, CEQA does not require a project to disclose impacts on itself, which is what appellants are requesting.

6. The City has not deferred a decision on the right-of-way. Required rights-of-way are set forth in the City's General Plan. As noted by MMC §§ 12.04 et seq., the City has adopted an official plan for streets and highways (the Transportation and Circulation Element) and all development must comply with the standards therein. It is an existing regulatory measure.

7. Conditions of approval 8, 9 and 10 are enforceable mitigation measures related to wastewater with quantifiable standards that can be implemented by the City.

8. Similarly, the Initial Study discusses the capture of stormwater, the capacity of the City's system, and existing regulatory measures that will be implemented for stormwater. Conditions 17 and 18 further provide detail as to what standards must be met, and reference the City's MS-4 Permit with which Applicant must comply.

9. Condition 30 is also an enforceable measure and is properly delegated to staff. Indeed, MMC § 20.38.050 specifically discusses reductions in parking and delegates approval of reductions to staff.

Therefore, for all the reasons set forth herein, we request that the City Council provide the Applicant the opportunity to address it during a public hearing at the June 15, 2020 hearing, that you deny the appeal and approve the Project with 214 units. Failure to do so will expose the City to significant legal and financial liability. Notwithstanding the above, Applicant retains all legal rights and remedies.

Sincerely,

Elisa Paster

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of GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO LLP

ELP:ep

cc: Scott McBride, Merced Planning Department, McBrideS@cityofmerced.org
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